U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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DATE: DEC 17 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismised.

The petitioner is a wholesale distributor of watches. It seeks to employ the beneficiary permanently in the United States as an operations analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, certified by the United States Department of Labor (the DOL). The director denied the petition based upon the determination that the petitioner failed to submit sufficient credible evidence demonstrating that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree[1] and sixty months of experience in the offered job of operations analyst or in the alternative occupation of "Executive Level Position within an organization (e.g., President, VP," as required on the ETA Form 9089.

On appeal, counsel asserts that the petitioiner has submitted sufficient credible evidence demonstrating that the beneficiary possessed the sixty months of experience in the offered job or in the alternative occupation of "Executive Level Position within an organization (e.g., President, VP," as required on the ETA Form 9089. Counsel includes copies of previously submitted documents, as well as new documentation in support of the appeal.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

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[1] The director determined that the beneficiary's Certificate of Graduation and corresponding transcripts from [redacted] could not be considered credible because the certificate stated that the beneficiary was awarded a Bachelor of Science in mechanical Engineering on February 26, 1987, but the transcripts reflected that the beneficiary had been awarded the degree on February 25, 1987. However, a review of these documents reveals that this apparent discrepancy is likely a product of the documents being photocopied multiple times and the resultant obfuscation of the date rather than a material and relevant discrepancy .

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

The petitioner must establish that the beneficiary is qualified for the offered position. Specifically, the petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, United States Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany* v. *Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coorney*, 661 F.2d 1 (1st Cir. 1981).

The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer exactly as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying the plain language of the [labor certification]." *Id.* at 834.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at *7.

The regulation at 8 C.F.R. § 204.5(g)(1) states, in part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. *If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.*

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

(Emphasis added). Therefore, USCIS may accept other reliable documentation relating to the beneficiary's employment experience to establish that the beneficiary possesses the experience required by the terms of the labor certification. Such evidence may include statements from former supervisors and coworkers who are no longer employed by the petitioner. USCIS may also consider copies of Form W-2 statements issued by the prior employer, paychecks, offer letters, employment contracts, or other evidence to corroborate the identity of the employer and the nature and duration of the claimed employment.

In the instant case, the ETA Form 9089 was accepted by the DOL for processing on September 10, 2010. The proffered wage as stated on the ETA Form 9089 is $68,650.00 per year. The ETA Form 9089 states that the position requires a bachelor's degree in "An Engineering major" and sixty months of experience in the offered job of administrative purchasing manager or in the alternative occupation of "Executive Level Position within an organization (eg., President, VP,." At part K of the ETA Form 9089, which was signed by the beneficiary on an indeterminate date, the beneficiary claimed to be presently employed as the president of [redacted] since September 26, 2006, previously employed as a "Technical Engineer" by Credit Card Processing Corp., from February 5, 2004 to September 26, 2006, previously employed as the president [redacted], from June 2, 2003 to January 30, 2004, previously employed as [redacted], from April 20, 2001 to June 30, 2003, previously employed as a claims adjustment department manager by [redacted], from October 1998 to December 29, 2000, previously employed as a claims adjustment department manager by [redacted], from January 8, 1996 to December 31, 1997, previously employed as an administrative manager by the Law Office of [redacted] from January 2, 1995 to December 29, 1995, and previously employed as an assistant manager by [redacted]., from January 6, 1987 to February 5, 1992.

As noted above, the ETA Form 9089 states that the position of operations analyst requires a bachelor's degree in an engineering major and sixty months experience in the offered job or in the alternative occupation of "Executive Level Position within an organization (eg., President, VP,." The record contains a Certificate of Graduation and corresponding transcripts that reflect that the beneficiary received a bachelor of science degree in mechanical engineering from the [redacted] in February 1987. Therefore, it is concluded that the beneficiary possesses the foreign equivalent of a U.S. bahelor's degree in mechanical engineering as required by the ETA Form 9089.

Although the Act and regulations do not contain a definition of the term "executive level position" for purposes of interpreting a labor certification, and "executive capacity" is defined at section 101(a)(44) of the Act. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily-
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> (i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U. S. C. § 1101(a)(44)(B). A beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because he has an executive title or because he "directs" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision vision or direction from the higher level executives, the board of directors, or stockholders of the organization." *Id.*

A review of experience letters and supporting evidence contained in the record reveals that the beneficiary was acting in a managerial capacity rather than executive capacity in his employment as a claims adjustment department manager by [redacted] from October 1998 to December 29, 2000, as a claims adjustment department manager by [redacted] from January 8, 1996 to December 31, 1997, as an administrative manager by the Law Office of [redacted] from January 2, 1995 to December 29, 1995, and as an assistant manager [redacted] and [redacted] from January 6, 1987 to February 5, 1992. Consequently, the beneficiary's employment with these companies cannot be considered as fulfilling the labor certification's requirement of sixty months of experience in the offered job or in the alternative occupation of "Executive Level Position within an organization (eg., President, VP,."

In support of the claim that the beneficiary possesses sixty months of experience in the offered job of administrative purchasing manager or in the alternative occupation of "Executive Level Position within an organization (eg., President, VP," as required by the ETA Form 9089, the record contains a letter dated February 3, 2010 and signed [redacted] president of [redacted]. In this letter, [redacted] stated that the beneficiary had been employed by this enterprise as a vice president-administration from April 20, 2001 to June 30, 2002 and president from June 2, 2003 to January 30, 2004. [redacted] provided a detailed description of the beneficiary's duties in his position as both vice president and president of [redacted] Therefore, the benficiary's employment with [redacted], can be considered to constitute twenty-one months of executive level experience.

The record contains a letter dated October 28, 2010 that is signed by the beneficiary in his capacity as president of the [redacted] The beneficiary noted in pertinent part that:

> [he] is in charge of day-to-day business administration of credit card merchant services. He is responsible for planning, developing, and implementing business administration policies and procedures. He is also responsible for setting the goals and objectives of the company, and developing and implementing business strategies and policies including sales efforts, market and business development, and contract negotiations. In addition, [the benficiary] develops company and departmental budgets, and analyzes budget variances.

The record contains a letter dated August 17, 2011, and a separate affidavit dated September 23, 2011, both of which are signed by [redacted] in his capacity as director of the [redacted] In both the letter and affidavit, In [redacted] essentially retiterated almost word for word the same description provided by the beneficiary in the paragraph above regarding his duties as president of the [redacted]

The record also contains the [redacted] Forms 1120, U.S. Corporation Income Tax Return, for 2006 and 2007, as well as this company's Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2008, 2009, and 2010. A review of these tax returns reveals that the Seo & Yi Corporation had gross receipts or sales of $17,023.00 and paid $0.00 in salary and wages in 2006, had gross receipts or sales of $360,899.00 and paid $0.00 in salary and wages in 2007, had gross receipts or sales of $498,273.00 and paid $14,400.00 in salary and wages in 2008, had gross receipts or sales of $471,161.00 and paid $14,400.00 in salary and wages in 2009, and had gross receipts or sales of $386,554.00 and paid $23,250.00 in salary and wages in 2010. The tax returns reflect that the Seo & Yi Corporation is a very small business generating only a few hundred thousand dollars a year in revenue, most of which is directed to "outside services," with no employees other than the beneficiary in 2006 and 2007, and no more than one or two employees in 2008, 2009, and 2010. The beneficiary's entrepreneurial self-employment with the [redacted] cannot be realistically described as an "executive level position within an organization" as there is no "organization" to lead. Consequently, the beneficiary's employment as president of the [redacted] was not an "executive" position and will not be considered in determining whether the beneficiary has sixty months of experience in the offered job or in the alternative occupation of "Executive Level Position within an organization (eg., President, VP," as required by the labor certification.

Furthermore, the letter signed by beneficiary as well as the letter and affidavit both signed by [redacted] do not contain a specific and detailed description of the benficiary's duties as president of the [redacted] It is not realistic that the beneficiary spent most of his time in this capacity "setting goals" and "planning policies and procedures" when it appears that he is running the day-to-day operations of the [redacted] The letters and affidavit do not explain what, exactly, the beneficiary did on a day-today basis as president of the [redacted]

The beneficiary's twenty-one months of executive level experience with [redacted], are not sufficient to satisfy the requirement of sixty months of experience in the offered job or in the alternative occupation of "Executive Level Position within an organization (eg., President, VP," as listed the ETA Form 9089. The beneficiary does not meet the labor certification requirements, and therefore, the petitioner has not established that the beneficiary is qualified for the offered position.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (AAO's *de novo* authority is well recognized by the federal courts).

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[3] If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967).

The record does not contain any evidence that the petitioner has employed the beneficiary since the priority date of September 10, 2010. Although the petitioner provided its Form 1120 tax return for 2010 and it reflects that the petitioner possessed sufficient net current assets greater than the proffered wage of $68,650.00 per year in this particular year, the record is absent any further evidence establishing that the petitioner had the continuing ability to pay the proffered wage to the beneficiary in 2011. Further, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

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[3] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Filed Nov. 10, 2011).

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.